

TUNE IN TO THE
SOUND OF DEMOCRACY

Justice Talking Radio Transcript

“O, Christmas Tree”: Religion in the Public Square—Air Date: 12/19/05

From allegations of U.S.-operated secret prisons to Abu Ghraib and Guantanamo Bay, the Bush Administration is revisiting the limits of legal conduct in its pursuit of intelligence. Congress has introduced legislation to limit the rights of enemy combatants to challenge their detentions in federal court while other measures, led by Senator McCain, seek to close loopholes in current anti-torture laws. On this edition of Justice Talking, we examine the laws that govern interrogations and the use of torture in the war on terror.

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MARGOT ADLER: From NPR, this is Justice Talking.

UNIDENTIFIED MALE: As we go into this Christmas season and begin to celebrate with our family and friends, I would hope that this year we spend some time reflecting on the true reason for this season.

EXCERPT FROM “A CHARLIE BROWN CHRISTMAS”: Look Charlie, let’s face it. We all know Christmas is a big commercial racket. It’s run by a big eastern syndicate, you know.

PRESIDENT GEORGE W. BUSH: The lighting of the National Christmas Tree is one of the great traditions of our nation's capitol. Each year, we gather here to celebrate the season of hope and joy; and to remember the story of one humble life that lifted the sights of humanity. Santa, thanks for coming.

MARGOT ADLER: I'm Margot Adler. Christmas comes but once a year, but the lawsuits continue long after the holidays are over. Holiday decorations in the public square and the separation of church and state – stay with us.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. It seems that everywhere you look in America right now there is some reminder of the holiday season, whether it's giant snowflakes hanging from lampposts, or lights and tinsel draped on evergreens in the town center or blown-up Santas on front lawns. It's hard to forget that this is our annual celebration of Christmas and Hanukkah and Kwanza and the winter solstice. But this is also the time of lawsuits over whether a nativity scene can or can't be at the city hall, the town library or the county courthouse. Some people are charging that there's an all-out war on Christmas. Others say that Christmas is alive and well. Along with the holiday cheer comes anger from some people who say that Christmas is being watered down. They're angry at the President for sending greeting cards that say "Happy Holidays" instead of "Merry Christmas." On today's Justice Talking, we'll answer the questions: Is it legal for children to sing Christmas carols in public school? When is a Norwegian spruce a holiday tree and not a Christmas tree? And does adding a menorah to the manger display at the town hall make it legal?

In short, we'll talk about religion in the public square with a debate on what is legally and culturally permissible in public displays of religious holidays. We'll also hear about a town in Kentucky where Christmas turned into a battle with the ACLU, and we'll visit Portland, Maine, where the city is trying to find just the right balance when decorating its streets - all that and the origin of Christmas trees. But first, to understand what the Founding Fathers might have said about Christmas and the separation of church and state I talked with Noah Feldman. He teaches law at New York University and is the author of "Divided by God: America's Church-State Problem and What We Should Do About It." It's published by Farrar, Straus and Giroux. He joined me in New York City.

Thanks for coming in to talk with me, Noah.

NOAH FELDMAN: Thank you so much for having me.

MARGOT ADLER: Let's go back to the early days of our country. Tell me what the Founding Fathers originally thought about the relationship between religion and government in America. Take us back there.

NOAH FELDMAN: The Founding Fathers combined a very deeply believed principle and some very practical politics in their thinking about church and state. The principle, which they broadly shared across the political spectrum, was the liberty of conscience. They believed that when it came to deciding about matters of religion, nobody could tell me what to do, and that especially meant that the government couldn't. Some of them took it even further and thought that if my tax dollars were to go to support any form of religion through the government that that very act of paying taxes to support religion violated my liberty of

conscience. The practical politics were that no one Protestant denomination in the United States – and almost everybody was a Protestant—it was a 95 percent Protestant country – believed that it could successfully dominate the national federal republic. They all knew that there were enough other denominations that they wouldn't be able to be the ones in charge, and that led them to abandon the idea of a single national official religion, and that led them to nonestablishment.

MARGOT ADLER: Now what would the Founding Fathers have to say about where we are now? For example, what would they say about someone like Roy Moore, the Alabama judge who put a huge Ten Commandments monument in his courtroom?

NOAH FELDMAN: The Founding Fathers would be mystified by Roy Moore, because the form of religion—contemporary evangelicalism—that he espouses, is one that was largely absent from the world in which they lived. They would've thought that putting a two-and-a-half ton monument of the Ten Commandments in front of a courthouse was a strange thing to do. They would, however, I think, have made up their minds about the constitutionality of what he did largely on the basis of the question of money.

If government money went in any way, shape or form to support a monument like that, they would've thought that it violated the liberty of conscience. But if no government money was spent, even if the symbol was very profoundly religious and was very much in peoples' faces, I don't think most of the Founding Fathers would've had any deep objection to it. Perhaps Jefferson might have, but including James Madison and the others, I think they would've had no problem with it.

MARGOT ADLER: You talked about the atmosphere around the time of the Founding Fathers, that there were many different Protestant religions. How would you characterize the breakdown of Americans today as far as religions—you know, how many Christians, how many Jews, how many Muslims, etc.?

NOAH FELDMAN: That these numbers are highly contested, I think, is the first thing to point out. But probably Jews in the United States are somewhere between three and four percent of the population; Muslims are probably around that same number, perhaps a bit less. This has been a very contentious debate in recent years with some Muslims saying there are many more Muslims than Jews and many Jews saying the contrary. You can imagine why it's in one's interest to make these declarations.

Hindus and Buddhists are still much behind that. They're probably, at best, one percent of the country, but probably somewhat fewer. Then of the rest of the country—the overwhelming majority—would identify themselves as Christian, which is a very different thing than saying that they belong to a church or that they attend church regularly. But it's still true that in the United States, well over 90 percent of the population would identify themselves as Christians of some kind.

MARGOT ADLER: And what percentage of the population would say they are of no religion?

NOAH FELDMAN: I think that number remains somewhere under five percent of the total population.

MARGOT ADLER: Do you think that the government treats religious groups differently depending on what religion is at issue? For example, do you think Christians are treated differently than Jews, Muslims, Bahais, Wiccans?

NOAH FELDMAN: There have been clearly some points in our history where that has been very much the case and it remains true today. For example, Christmas is a federal holiday and that's notably not true of the holidays of these other groups. That reflects the historical heritage of the United States as a country that is overwhelmingly Christian.

MARGOT ADLER: Has the Supreme Court distinguished between different types of religious speech? For example, there have been battles over "In God We Trust," over the Ten Commandments, over prayers at the beginning of Congress, at football games. What's permissible and what's not at this point?

NOAH FELDMAN: Even the Supreme Court couldn't answer that in a single sentence or probably not even in several volumes. The reason is that the Supreme Court is profoundly confused about this. A good example of this is the recent decision about the status of the Ten Commandments. The Supreme Court held that a statue—a granite statue of the Ten Commandments standing outside the Texas Statehouse—was constitutional, in large part, it seems, because it was pretty old, about 50 years old. Cecil B. DeMille and others had put it there.

MARGOT ADLER: And it was standing with other statues also.

NOAH FELDMAN: The other statues are not visible when you stand in front of it, actually. You have to look all the way around, though there are other statues there, for sure. Then, at the same time, the very same day, the Court decided another case involving displays of the Ten Commandments that were part of another display with lots of various religious and non-religious documents inside of several courthouses, and it held that those displays—in part because they were new displays—were unconstitutional and violated the separation of church and state. Another famous example of this is two different decisions, each about a Christmas crèche and its display. In one case, the crèche was displayed more or less on its own on courthouse steps, and in the other a crèche was displayed with plastic reindeer and other pseudo-secular symbols floating around it. The court said if the plastic reindeer are there, the crèche is constitutional. In the absence of the reindeer, the crèche is unconstitutional. It's very hard to justify.

MARGOT ADLER: But I guess you could argue that there is a difference between individuals putting the crèche in a community space and government putting a crèche in a government building.

NOAH FELDMAN: In general it's true that if private parties are expressing their religious speech, under most circumstances it will be permissible. But that's not invariably true. In

some cases, for example in the Pittsburgh case where the crèche was right in front of the public steps, it was actually owned by a private party and yet it was still held to be unconstitutional. So I wish that were a perfect principle, but even that one doesn't cover every case.

MARGOT ADLER: Let's talk for a minute about Christmas. Christmas is the only religion-based national holiday in America – the banks are closed, schools are closed. First of all, when did this come about? I know the Puritans hated Christmas, right? They banned Christmas, in fact. So how did this come to be?

NOAH FELDMAN: Well, we should not forget Thanksgiving, by the way, which is also a religiously-based holiday. It's just that we don't think of it that way anymore.

MARGOT ADLER: We just think of it as turkey, right?

NOAH FELDMAN: We do think of it as turkey, exactly. It's sort of the way we think of Christmas as Santa Claus. The Puritans didn't like Christmas because they associated it with celebrations, and the Puritans, as you know, didn't like celebrations very much. They thought that led to frivolity. In fact, they knew that it led to frivolity and frivolity led you away from God. But that view was not the universal view in the United States, and there were people in other parts of the country who were not Puritans who had inherited the practice of celebrating Christmas from England and wanted to continue to celebrate it as a crucial religious holiday. And over time, of course, that celebration came to be less and less a religious one and more and more a secularized one and a commercialized one, but the holiday remained in place. Thanksgiving is a trickier one. There were days of thanksgiving proclaimed as early as the presidency of George Washington and they always came with a clear indication of who you were giving thanks to and it was definitely God. But that wasn't necessarily a federal holiday at first. Only over time did it become understood as a day when people would take off of work.

MARGOT ADLER: We talked about the Supreme Court's decisions on Ten Commandments. How has the Supreme Court ruled on official displays of crèches, menorahs and Christmas trees?

NOAH FELDMAN: To an extent there's a general rule, and it's not a great general rule. It said that if these are displayed together in a context which also includes some secular symbols – plastic reindeer, a talking wishing well – that they will be constitutional. If, on the other hand, a crèche is displayed in a way that's unique and alone, it's more likely to be understood to be an unconstitutional violation of the separation of church and state. The principle that the court has tried to adopt is that if the symbol is one that appears to be the government endorsing religion, then it's unconstitutional. But if on the other hand it doesn't appear to be an endorsement, it is considered to be perfectly okay.

MARGOT ADLER: And what kind of evidence would a court need to determine that?

NOAH FELDMAN: That's the \$64,000 question, and usually courts rely on just what courts like to rely on, which is to say their own eyes and their own ears. Courts tend to make a sort of ad hoc determination of this. They don't do research to find out what counts as an endorsement, they just ask themselves what they think is an endorsement. And that, of course, is one of the huge problems with the so-called endorsement test. It very much lies in the eye of the beholder. So you'll get five justices saying something endorses religion and four justices saying that it doesn't in the exact same case, and it's extremely unpredictable as a matter of constitutional law. And, of course, one of the points of constitutional law is you're supposed to know in advance what's permissible and what isn't, but very frequently in the church-state context we just don't.

MARGOT ADLER: The Reverend Jerry Falwell and other religious leaders have been complaining in recent days that the Supreme Court and other politicians are secularizing Christmas. They're complaining that the White House has a holiday tree and sends out holiday cards rather than Christmas trees and Christmas cards. So what do you think of this recent war on Christmas that's being touted by the Christian Right and by conservative pundits on Fox News?

NOAH FELDMAN: First of all, I don't think there is any self-conscious war on Christmas going on. I think that's the first important thing to recognize. There is a desire on the part of lots of people, including President Bush, to be as inclusive as possible and to use a phrase like "Happy Holidays" with the goal of being inclusive. The unintentional effect of big corporations, for example, trying to be inclusive in this way, or the President himself, whose religious beliefs are in no doubt at all being inclusive in this way, is that some people start to feel excluded by this – let's call it – "excess of inclusiveness." And that's, I think, the resentment that somebody like Jerry Falwell or Bill O'Reilly is tapping into.

MARGOT ADLER: In your own view, do you think that a city or a town should sponsor a religious display, like a crèche, on public property, or not?

NOAH FELDMAN: I think that a city or town that wanted to spend money on such a display would be violating the most basic constitutional principle. On the other hand, I think that if a town has a public square where lots of people put displays up all year round and people stand on soap boxes and make arguments, that that space has to be just as open to religious display as it does to any other kind of display. And I think that's a balance that's not easy to strike. It sometimes will be hard to draw the line, but I think that is the basic balance that works the best for us.

MARGOT ADLER: Noah Feldman, thanks for talking with me. Noah Feldman teaches law at New York University, and is the author of "Divided by God: America's Church-State Problem and What We Should Do About It." It's published by Farrar, Straus and Giroux. Coming up, we'll hear how Christmas in a small Kentucky town turned a holiday display into a free-for-all, and we'll talk about what's legal and what's not.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. On today's show we're talking about what happens when celebrating the birth of Jesus comes in conflict with the First Amendment. In LaGrange, Kentucky, Christmas hasn't been all about peace on earth. It started a couple of years ago when a local church set up a nativity scene on the county courthouse lawn. Cameron Lawrence has this story.

CAMERON LAWRENCE: David Friedman says he doesn't mind being in the thick of things. Good thing, because that's frequently where he is. As general counsel for the ACLU of Kentucky, Friedman works in contentious terrain. Where does he spend his time? Often on the push and pull between church and state.

DAVID FRIEDMAN: We tease that there are two seasons that ACLU lawyers always dread – December and June: December for the crèche cases and June for the graduation prayer cases.

CAMERON LAWRENCE: That was just the case two years ago when Friedman got involved in LaGrange, Kentucky, population 6,000 – a bucolic community about 20 miles northeast of Louisville. A local church staged a living nativity on the lawn of the old brick courthouse there.

DAVID FRIEDMAN: We had received complaints and we had written to county officials and the policy had never changed. In 2003 when the crèche was again erected on the courthouse lawn, we took action.

CAMERON LAWRENCE: Grace Baptist, a local independent church, had displayed the nativity since 1990 as part of a winter festival called "Light Up LaGrange," an affair featuring holiday decorations, Santa Claus visits and carriage rides in the community's Norman Rockwell-like downtown. Mary Ellen Kinser is Oldham County's judge executive, its top elected official. She stands near Main Street at the corner of a city lot-sized lawn dotted with evergreen trees and shrubs, what's called in town "the County Courthouse Square."

[Speaking to Kinser] Is this where it was?

MARY ELLEN KINSER: Yes, it was right here on the courthouse lawn and the nativity scene itself would have live people standing in it with live animals in the evening and a spotlight on it right beside this very busy highway, as you can tell.

CAMERON LAWRENCE: At the time, Oldham County had no formal rule in place governing requests to use the courthouse lawn. Kinser says the nativity was a longstanding and unspoken tradition in town, but Beth Wilson, executive director of the ACLU of Kentucky, says the ACLU is concerned that by allowing one church to erect a nativity on government property, the county might be endorsing one group's beliefs over others.

BETH WILSON: County officials told us that this particular church was allowed to put up a crèche and anybody else could do the same thing. So we asked the county for permission to put up an ACLU banner to make sure, really, that this was, in fact, an open forum as they had claimed it was.

MARY ELLEN KINSER: So I said, "Tell you what – bring your banner on out and put it up."

CAMERON LAWRENCE: Mary Ellen Kinser.

MARY ELLEN KINSER: So the ACLU brought out their banner and put it up on the courthouse lawn near the nativity scene. Then the ACLU said no, we want to bring out more.

CAMERON LAWRENCE: David Friedman says the ACLU asked permission to put up signs on behalf of several clients including a gay rights organization, Planned Parenthood and the Circle of the Blue Moon, a Wiccan group.

DAVID FRIEDMAN: And that was too much for the county. They said uh-uh, can't do it. Now we thought as a matter of law that they couldn't pick and choose based on the content, so our clients put up the signs anyway without the county's support or permission.

CAMERON LAWRENCE: The next day, December 23rd, Oldham County Judge Kinser took the signs down, intending to replace them, she says, after December. On December 30th, the ACLU sued in U.S. District Court, claiming Kinser violated its clients rights to free speech and equal protection under the law.

DAVID WOOSLEY: It was shocking that that would happen in a small community like this. They had to come from another county to cause us trouble in this county.

CAMERON LAWRENCE: Dave Woosley is the pastor of Grace Baptist, the church that staged the living nativity. He says that when the ACLU sued, he and many members of his church felt their rights were violated.

DAVID WOOSLEY: My goal in this community is to preach the gospel of Jesus Christ, not to fight with the ACLU or fight with the government, but the Bible says to live peaceably with all men as much as lieth in you and there may come a time when we have to take a stand and fight back.

CAMERON LAWRENCE: County Judge Kinser agrees, saying Grace Baptist's freedom of speech was abridged. But on December 31st, a federal judge granted an injunction saying the county could not allow some groups to exercise their free speech rights while denying the same rights to others without a formal content neutral policy in place. The judge said the county had no legal grounds for removing some signs and not others. In March of last year, Oldham County settled the suit and paid \$5,000 of the plaintiff's legal costs. The county agreed not to interfere with free speech on the courthouse square.

Francis Mannion, senior counsel with the American Center for Law and Justice, an advocacy law firm founded by evangelist Pat Robertson, says cases like this are sterilizing religion out of American life.

FRANCIS MANNION: It's really punishing small towns and communities in places like Kentucky and everywhere else they go for simply observing traditional public holidays.

CAMERON LAWRENCE: Mannion, who often argues against David Friedman on church and state cases, says it comes down to an interpretation of the First Amendment.

FRANCIS MANNION: It is an acute over-reaction, it seems to me, to see in any public acknowledgement of majoritarian religious sentiments broadly shared for 200 years, a threat of religious coercion or religious persecution. And in overreacting what we have done is, I think, removed from traditional American observances something of value to a lot of people that doesn't threaten anyone in any serious way.

CAMERON LAWRENCE: Last year, the county rejected Grace Baptist's request to again put a living nativity on the courthouse square. Instead the church put it on a private lawn across the road. This year, Grace Baptist Church has a new location for its nativity – just down the street on private property between the Dairy Queen and a cemetery. For Justice Talking, I'm Cameron Lawrence in Louisville, Kentucky.

MARGOT ADLER: Here to talk about Christmas displays in the public square—the constitutional conflicts and the courts' resolutions—are Marci Hamilton and Rick Garnett. Marci Hamilton is a law professor at the Cardozo School of Law in New York City. She is the author of a book called, “God vs. the Gavel: Religion and the Rule of Law.” Welcome Marci.

MARCI HAMILTON: Thank you.

MARGOT ADLER: Rick Garnett is an associate professor of law at Notre Dame. He has represented religious organizations in several influential church-state cases. Welcome, Rick.

RICK GARNETT: Thank you.

MARGOT ADLER: Okay, so we're talking about religious holiday displays in the public square. There have been lots of court cases about this. It seems like every year there's at least one that makes headlines. What have the courts said is legal when it comes to holiday decorations on public property? Marci, let's start with you.

MARCI HAMILTON: Well, let's actually start with what's illegal. It's clearly illegal to have in a courthouse a nativity scene—Jesus and Mary and Joseph—by itself. So if the message from the display is that there is one religion and the government stands behind

it, that's unconstitutional. But if you mix it up, if you have a variety of religious elements, you have a menorah and references to Christmas, if you have more secular aspects like Frosty the Snowman, that diversity, inclusiveness, ends up being constitutional.

MARGOT ADLER: And, Rick, would you agree with that or would you have a different point of view?

RICK GARNETT: No, that's right. What I would add is a distinction of expression that's by the government, on government buildings or public property—and there I think that Marci stated it right—we want to make sure and add that private expression in the public square – like say in a park or in some other kind of location that's been opened to speech by private people – there religious speakers are allowed to be explicitly denominational. You're allowed to have a nativity scene without joining your nativity scene next to a menorah or a display for another religion's holiday. So it's always worthwhile distinguishing between speech by government and speech by private persons in the public square.

MARGOT ADLER: Now, Rick, what about those nativity scenes? They seem to cause the most problems in all of these cases that we're talking about.

RICK GARNETT: Well, they certainly have in several of these cases that have involved government speech. Nativity scenes, unlike Christmas trees, are clearly and unmistakably religious. Their content is clearly religious. That's the idea. And for those of us who are religious believers, then the nativity scene has special meaning. That's why the courts have, as Marci said, taken special care to make sure that the government's not sending a message of special endorsement or exclusion.

MARGOT ADLER: Marci, you were talking about the difference between a nativity scene and let's say, Frosty the Snowman. What makes a symbol religious and what makes it secular?

MARCI HAMILTON: Well, that is one hard line to draw, and the courts, all in all, have avoided being very technical about that. The Christmas tree is kind of on the line between secular and religious just because it's taken on a life of its own in the culture. I think that everybody would agree that the nativity scene is the most religious, although once someone actually suggested to me: Do we really have a problem here if when I polled my students at Yeshiva University, which is about 75 percent Jewish in my law school classes, they didn't know what a nativity scene was? So in some ways, having a nativity scene for an educational purpose would be one thing—I don't think that's going to get anybody into trouble.

The problem is that we have plenty of smaller governments—not the federal government so much, but smaller governments—in the United States that are in communities dominated by Christians who want Christianity to be the exclusive or the sole focus of

the holiday. It's in those circumstances that the Constitution is most important because even in those communities in this day and age, you're going to have other believers.

What Justice O'Connor added to the Establishment clause, I think quite rightly, was the concept that government can't endorse a religious viewpoint, and the reason it can't is because it makes those who aren't part of that religion feel disenfranchised – feel like they're really not full citizens. And so although I think these issues are actually getting less divisive because governments are figuring out how to bring in a mix of messages, we still have local governments that still have this focus on Christianity and making it a Christian holiday by the government. To the extent that they do that, that's clearly unconstitutional.

MARGOT ADLER: Rick, has the court contradicted itself in ruling in these cases involving Christmas displays?

RICK GARNETT: Sometimes perhaps. I guess I would say that it's not so much a contradiction as it is just the inevitable result of when you have a standard that has some flexibility built into it and when you have a standard that requires courts to draw lines in areas where it's hard to draw lines, like whether a menorah is religious or secular. Justice O'Connor, who Marci mention a second ago, in one of the more famous cases involving holiday displays, pointed out that it's a little awkward for courts to be getting into telling people what symbols mean. It's kind of a delicate enterprise.

I think the court has generally – and I think Justice O'Connor's been probably a leader over her career in this – moved toward an approach that says you can acknowledge religion and you can permit private people to speak religiously in a public square, but you can't endorse it. That is, you can't send this message of exclusion.

MARGOT ADLER: Marci, when did we first start seeing these kinds of cases about holiday displays?

MARCI HAMILTON: We really didn't start seeing them until Justice O'Connor was on the court in the early '80s, mid-'80s, and two cases came up rather quickly when she was quite a junior justice. One was a case involving the nativity by itself in a hallway in a courthouse, and the other case involved a more general display with much more variety in it. And the one in the courthouse was clearly unconstitutional because you couldn't even make the argument that it was there for the purpose of encouraging shopping.

The context is what so often determines the results in these cases, and the context there was a courthouse, and just as Judge Roy Moore found out, the courthouse background does not help the argument that the religious symbol ought to be there. Now with respect to the other case that Justice O'Connor had early in her career, there she was willing to say look, there are religious symbols here. There's a Christmas tree. There's no debate about the fact that these are religious. But there are also some secular symbols and the placement of that display was for the very purpose of engendering and encouraging shopping, and of course cities have every right and power to encourage shopping,

encourage higher tax proceeds during that time of the season. That secular purpose saves some religious content, and so there's this droning complaint in our culture that Christianity or Christ is being removed from Christmas. Really, that's a misstatement. What's happened is that the court has said it just can't stand by itself in a context where it's just the government speaking.

So the message that Justice O'Connor implanted into the doctrine – and there are many right-wing Christian groups and other religious groups who don't like this – is inclusion. The idea is that we're all equal citizens and that religion ought to be protected and respected but the government should not be able to stand behind even a dominant religion.

RICK GARNETT: It's worth pointing out, I think Marci would agree, that many left-wing groups haven't liked Justice O'Connor's willingness to tolerate religious expression in the public square.

MARCI HAMILTON: You know, she can't win [laughs] – that's a fact.

MARGOT ADLER: Speaker of the House Dennis Hastert had the honor of lighting the National Holiday Tree outside the Capitol building in Washington, D.C. earlier this month. It has been called this since the 1960s. Hastert thought the 83-foot Angleman spruce should be called a Christmas tree, so a Christmas tree it is. But, Rick, aren't Christmas trees, wreaths, Yule logs, and mistletoe all pagan symbols? Why are Christians and secularists fighting over pagan symbols?

RICK GARNETT: Well, this goes back to the point we were talking about a little earlier. It's sometimes hard to pin down exactly what a symbol means. I think it is true that Christianity, as it did in many cases, co-opted symbols that were being used in pagan contexts. But I do think, in our context, the social meaning of a Christmas tree is clearly that it's a Christmas tree, that it's a reminder of a Christian holiday. My own view is that it's not inappropriate to call this thing a Christmas tree. What I'd like to see happen is that if we're going to have a Christmas tree on the mall, let's also have some recognitions of other faiths' important holidays. Not necessarily picking out Hanukkah, which might well not be nearly as significant to Jewish believers as Christmas is to Christians, but picking out something that's really significant and captures the contributions and the presence of Judaism in our culture.

MARGOT ADLER: Are there any other symbols on the mall?

RICK GARNETT: There is a menorah on the White House lawn.

MARGOT ADLER: Here's a question: As we become more of a multi-ethnic and multi-religious nation and are more inclusive and have more symbols, how do we navigate appropriate responses with all these religions? After all, there are religious traditions and holidays for Hindus, for Sikhs, for Bahais, for Muslims, for Buddhists – where do we draw the line?

RICK GARNETT: I don't have a bright line legal answer here. It seems to me the best thing to do is to look to politics but to keep an eye on it in the way that Justice O'Connor and others counseled – making sure that we're focusing on inclusion and equal assess and official neutrality while also recognizing that religious expression is every bit as protected and valuable under the First Amendment as any other kind of expression.

MARGOT ADLER: Coming up, more of our debate or whether there really is a war on Christmas. Later in the show, we'll get a history lesson on the origin of Christmas trees. Don't go away.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. We're talking about holiday decoration – what holiday displays are legal and when Christmas decorations in public places violate the U.S. Constitution. I'm talking with two people who know very well the ins and outs of holiday decorating – what's legal, what's not, and whether putting a nativity scene on government property is ever a good idea. Rick Garnett is an associate professor of law at Notre Dame, and he has represented religious organizations in several of these holiday legal cases. Marci Hamilton is a law professor at Cardozo Law School, and is the author of the book “God vs. the Gavel: Religion and the Rule of Law.”

I'd like to bring into the conversation Brian Fahling, a lawyer with the American Family Association Center for Law and Policy, a Christian law center that does First Amendment litigation. He's represented a number of people who felt their religious freedoms were violated. Welcome, Brian.

BRIAN FAHLING: Thanks for having me.

MARGOT ADLER: Brian, you've been involved in a number of cases where Christmas celebrations were censored or decorations were taken down. Tell us about a couple of these cases.

BRIAN FAHLING: Sure. Well, most recently, we just received a call yesterday from some concerned individuals in Chula Vista, California—a group of young girls, 8 to 12, in a dance troop. They're homeschooled girls and they attend a church in the Chula Vista area, a Calvary Church, and they've been invited to participate in a holiday festival. And part of that festival in Chula Vista consists of a parade, where they dance to what they refer to as praise and worship music. The girls appeared at the parade prepared to perform wearing shirts that said "Jesus Dancer" and had a cross on them.

When they appeared in those shirts, a city official took note of them and said that he didn't think it'd be appropriate if they wore those shirts during the parade. And so it took about half an hour, apparently, for this official to investigate and conclude that it would be inappropriate for them to dance in the parade with those shirts on. He also learned, of course, that the music that they would be dancing to had a Christian theme to it.

MARGOT ADLER: So you're taking this case on?

BRIAN FAHLING: Yes, we are. Yeah, we're in the midst of preparing our lawsuit right now.

MARGOT ADLER: Do you think that Christmas is under attack?

BRIAN FAHLING: Well, you know, attack can bring with it questions of motivation, and I'm not prepared to go into motivation. I can objectively look across the country and I see that there does seem to be an increasing number of cases where local level officials in particular are taking action with respect to Christians who may want to participate in the public arena whether it be in the school or in a parade, and excluding them on the basis of ostensibly an establishment clause violation, when in fact no establishment clause violation would be occurring.

MARGOT ADLER: Do you think that Christmas faces more censorship than other holidays?

BRIAN FAHLING: Well it certainly seems to, and part of the reason is the celebratory aspects of it through symbols and public displays of those symbols of Christianity.

MARGOT ADLER: It would seem counter-intuitive, to some extent, that the religion of the majority would be the most censored.

BRIAN FAHLING: There was a time, I think, when it was counter-intuitive, but I would say the last 15 to 20 years certainly would make it much more intuitive, because this year, of course, is the first year that we've seen this type of activity both on the litigation side and on the side of just simply sending letters by law firms like ours to city officials who may, in fact, have transgressed the line, if you will.

MARGOT ADLER: Marci, would you like to respond? What would you say to Brian?

MARCI HAMILTON: With respect to the notion that we would think in the last 15 to 20 years that there was an uprising of animosity or whatever toward Christianity, it's very hard to take in a context where Christian groups have extraordinary political power at the federal level. The notion that they are under attack just is hard to believe.

MARGOT ADLER: Brian, thank you so much for joining us.

BRIAN FAHLING: Well, I appreciate you having me.

MARGOT ADLER: Brian Fahling represents Christians in First Amendment cases.

I'd like to bring Annie Laurie Gaylor into the conversation. She's president of the Freedom From Religion Foundation – a group that advocates for the separation of church and state. She's bothered by all the religious activity that happens in Madison, Wisconsin every December.

ANNIE LAURIE GAYLOR: Yes, every year the Wisconsin State Capitol kind of gets taken over by Christianity for the month of December. When Tommy Thompson was our governor we got into a lawsuit with him because in response to a nativity pageant taking over the capitol for an entire weekend, and constant Christmas caroling and a menorah being lit in response to the Christmas tree and so on, we put up a banner saying "State-Church – Keep Them Separate." And we did that for several years with a permit, and then one winter Governor Thompson demanded that our banner be torn down even though we had a legal permit, and we went to court.

We technically lost because the State of Wisconsin then adopted a rule saying that all displays had to be something like 30 by 40 inches high, and they have ever since then let us put up a display. But instead of putting up one in support of separation of church and state, we decided to use that opportunity to promote Freethought – the 14 percent of the U.S. population that is not religious should have a place at the capitol. And so our sign says, "At this season of the winter solstice, may reason prevail. There are no gods, no devils, no angels, no heaven or hell. There is only our natural world. Religion is but myth and superstition that hardens hearts and enslaves minds."

MARGOT ADLER: Rick, do you have a problem with her position?

RICK GARNETT: It seems to me that she makes a good point in that one never wants to forget that there's pluralism when it comes to religious beliefs in this country. But where I think she goes wrong is in suggesting that it's some kind of a constitutional wrong done to people who have her views for the politically accountable representatives to acknowledge the fact that most people have a different view. I'm a big fan of reason just as much as Ms. Gaylor is, but I don't think that she's being insulted by the government acknowledging that a lot of us think at holiday time that Christmas and Hanukkah are worth thinking about, and that it's not just superstition that's enslaving our minds.

MARGOT ADLER: Bottom line: Should my daughter or son be able to sing Christmas carols in public school?

RICK GARNETT: Yes.

MARGOT ADLER: Marci?

MARCI HAMILTON: Only if they're also singing some secular songs and some of the other religions that are present in our society, so that it's inclusive and not exclusive.

MARGOT ADLER: That will have to be the last word. Merry Christmas, Happy Holidays, Happy Hanukkah, Happy Solstice, Feliz Navidad, Happy Kwanza, Happy New Year – whatever it is you celebrate.

I want to thank you both for coming on Justice Talking. Marci Hamilton is a law professor at the Cardozo School of Law in New York City. She's an expert on church-

state issues and has written a book called “God vs. the Gavel: Religion and the Rule of Law.” Thank you, Marci, for coming to our studio in Philadelphia.

MARCI HAMILTON: Thank you and happy holidays.

MARGOT ADLER: Rick Garnett is an associate professor of law at Notre Dame and has represented religious organization in several church-state cases. He joined us from a studio at Notre Dame – thank you so much.

RICK GARNETT: Thank you for having me.

MARGOT ADLER: In Portland, Maine, while there is a Christmas tree and a Menorah in the public square, the town has decided that the best way to get beyond all the arguments is to just have sparkling lights everywhere. Claire Holman reports.

CLAIRE HOLMAN: Portland, Maine is no stranger to holiday decorations debates. In 2001, a local rabbi had the fire department raise him up with a ladder truck to light the candles on the 18-foot metal Menorah in front of city hall, not far from the city's Christmas tree. After that, Christian groups wanted a nativity scene, so the next year the city manager decided to halt all holiday displays at city hall. Communications Director Peter DeWitt says things have gotten out of control.

PETER DEWITT: These things were getting bigger and bigger and the Menorah itself was turning into somewhat of a fire hazard in terms of keeping it lit, and, you know, the length of the candles, et cetera. So we came to some consensus and basically now both items will be in City Hall Plaza as they have been in the past, but at a different height.

CLAIRE HOLMAN: But at the same time, elsewhere in Portland, the city and its partner, the Portland Downtown District, had hired local artist Pandora LaCasse to create artistic light installations that were meant to represent every holiday – Christmas, Hanukkah, Kwanza – in an artistic way.

PANDORA LACASSE: My forms are very abstract and my intention is to keep it that way, to keep it sort of with a little bit of humor, a little bit of beauty and just a little bit out of the ordinary. So my intention is not to create a Christmas environment, but to create light and form and space.

CLAIRE HOLMAN: Now, even local businesses and organizations are seeking out LaCasse for additional installations. On a recent frigid December night, The Friends of Deering Oaks, a citizens group dedicated to protecting one of Portland's historical parks, gathered to throw the switch lighting the candelabra – a well-known oak tree named for its shape.

UNIDENTIFIED FEMALE: It's so beautiful. It really is gorgeous. Isn't it so fabulous? We're so lucky, and we're so lucky that we live in Portland. It's a candelabra, it's a menorah, it's

a tree, it's a – I don't know – it's the holidays, it's winter in Maine. It makes it bearable, doesn't it?

CLAIRE HOLMAN: Bearable, even popular enough not to have attracted controversy. Perhaps that's because the lights leave a lot of room for interpretation. Here's how Pandora LaCasse described the holiday lights she's done for the Maine College of Art building.

PANDORA LACASSE: So my idea for that, because it was the art college, was to sort of cascade these spheres coming off the roof of the building, coming down to the canopy, then spilling over into the canopy so it sort of looks like maybe sort of paint splashes or something that, you know, sort of falls from the building, and then sort of mix it up on the canopy.

CLAIRE HOLMAN: And as for passersby?

UNIDENTIFIED FEMALE: Well, it looks like a Christmas tree and it has all kinds of nice happy pastel lights on it. It's very, very festive. There's purple, pink, yellow, green, blue – just about everything. It's the whole Christmas spirit. It just brightens up your day, or your night, whatever.

CLAIRE HOLMAN: Wandering in Portland, one sees trees wrapped in lights with watermelon-sized shapes dangling like giant magic gumdrops lit in amber, teal or salmon, or bright blue and green half-spheres that climb the sides of buildings. All of this reflects the city's determination to be inclusive, and that's a concept that appears to be catching on. Pandora LaCasse has lights in the town of Bath, at the L.L. Bean store in Freeport and inquiries from at least two other towns. It's going to be a big light order when she starts up again, in April. For Justice Talking, this is Claire Holman.

MARGOT ADLER: What is the origin of the Christmas tree, and why do millions of Americans drag evergreen trees into their home each December and decorate them? Our producer Erin Mooney wanted to find out. She vaguely remembered being taught about this in seventh grade, but was a little fuzzy on the details. So she called Alan Schick, her former social studies teacher at St. Helen's School in Schenectady, New York. She says she hasn't talked to him since she wore those horrible Catholic school uniforms in 1983.

ERIN MOONEY: Mr. Schick?

ALAN SCHICK: Yes.

ERIN MOONEY: Hi.

ALAN SCHICK: How are you?

ERIN MOONEY: I'm good. I don't know if you remember me. I haven't talked to you in 23 years.

ALAN SCHICK: Well, it's good to talk to you, Erin.

ERIN MOONEY: Well, thanks. You know, when I think about the holidays, I just remember you really took some care and time to teach students about the origins of holidays and where our traditions and our celebrations come from, and even more than 20 years later, that still sticks with me and I remember that, so thank you.

ALAN SCHICK: Well, that's wonderful. I'm delighted.

ERIN MOONEY: And I have to say, I remember as a seventh grader, when you talked to us about Christmas and gave us the whole lesson on where our traditions come from. I'm wondering if you could take me back into seventh grade and teach me the things that maybe I forgot or learned then, you know, particularly around Christmas trees and how Christmas trees went from just being trees to becoming one of the biggest symbols of Christmas.

ALAN SCHICK: It seems, and in the research that I've read over the years, that we have really no definitive actual dated accounts of some of these events, but it appears that the Christmas tree that we use today came from what was called "The Paradise Play" that they did in the villages of what we might call the Germanic states nowadays – central Europe – where the people around Christmastime in the dark days were looking for entertainment. Around Christmas, they used to try to act out some of the religious plays that were at the time of the year. Particularly, they acted out around Christmas the creation story with Adam and Eve and the story of the tree of lights in the garden.

ERIN MOONEY: And this probably wasn't a Douglas fir, was it?

ALAN SCHICK: No, I doubt it very much, but it seems like the people who were pressed into getting the props for these plays had to use every stretch of the imagination they could. In December in middle Europe you're not going to find any trees at all except some kind of an evergreen, so I used to tell the kids the great producer of the play would say, "I'm sure there were no evergreen trees in paradise." And they would say something like, "You find a palm tree or some other kind of tree around here if you want it."

ERIN MOONEY: Their budget didn't allow for that, I guess.

ALAN SCHICK: That's right. All they could find in the German states in those days would be some dried apples, so the apples got hung on the tree for the fruits in the story, and it went on to say how Adam and Eve lost paradise. But at the end of the story there's the happy ending where the coming savior would come and change things and the story would have a happy ending. Then they'd put all kinds of savior-like elements on the tree and we think that's where the lights came on, lights reminiscent of the Bible passages of Christ being the light of the world.

ERIN MOONEY: And what about pagan origins in Christmas?

ALAN SCHICK: Well, there are many pagan stories about sacred trees and so on. The Germanic tribes worships a sacred oak, it was said, that existed in the forests of Germany, and St. Bonovas, when he was sent to preach the new Christian religion to the German tribe, in one of the legends, cut down the oak tree. In the center, there was a little teeny fir tree, and he said from now on this fir tree will be a symbol of the new light of the new god. So some of these ancient symbols like the Yule log too, which was a tree celebrated with the ancient Yule festival of the pagan/Germanic tribe...

ERIN MOONEY: And when did we start bringing Christmas trees to America?

ALAN SCHICK: Well, we're not positively sure, but it seems like the first records we have of them anyway is from the Pennsylvania Dutch who were the Germans who came here to Pennsylvania somewhere in the 1700s.

ERIN MOONEY: And so do you have your Christmas tree up yet?

ALAN SCHICK: No, not yet. I guess I'm an old conservative. I do some advent decorating with round wreaths and so on and the purple ribbons; then just before Christmas, I put up the Christmas tree.

ERIN MOONEY: Well, I want to thank you so much, and Merry Christmas to you. And thanks so much for talking with us today.

ALAN SCHICK: Well, I'm very delighted. Thank you, Erin.

MARGOT ADLER: Alan Schick taught middle school for 41 years at St. Helen's School in Schenectady, New York. He retired in June.

What do you think about holiday displays in public? Do you think Christmas is under attack, or are you offended by the abundance of Christmas symbols all around you? You can tell us by going to our website, justicetalking.org. Thanks for joining us. I hope you'll tune in next week. I'm Margot Adler.
